IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 23, 2004

ABU-ALI ABDUR'RAHMAN v. PHIL BREDESEN, ET AL.

Appeal from the Chancery Court for Davidson County
No. 02-2236-III Ellen Hobbs Lyle, Chancellor

No. M2003-01767-COA-R3-CV - Filed October 6, 2004

This appeal involves a challenge to the Tennessee Department of Correction's three-drug lethal injection protocol. A prisoner awaiting execution filed suit in the Chancery Court for Davidson County asserting that the procedure used to adopt the protocol was legally flawed, that the protocol violated various licensing and regulatory requirements, and that the protocol itself violates the prohibitions against cruel and unusual punishments in Tenn. Const. art. I, § 16 and U. S. Const. amend. VIII. The trial court granted the State's motion to dismiss the challenges to the adoption of the protocol and the protocol's compliance with regulatory requirements. Following a hearing, the trial court filed a memorandum and order concluding that the Department's lethal injection protocol does not result in cruel and unusual punishment. The prisoner has appealed. We affirm the trial court's conclusion that the adoption of the protocol was consistent with state law and that the protocol's method of lethal injection does not violate either Tenn. Const. art. I, § 16 or U.S. Const. amend. VIII.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Bradley A. MacLean, Nashville, Tennessee, and William P. Redick, Jr., Whites Creek, Tennessee, for the appellant, Abu-Ali Abdur'Rahman.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Stephanie R. Reevers, Associate Deputy Attorney General, for the appellees, Phil Bredesen, Quenton White, Ricky Bell, Virginia Lewis, and Tennessee Department of Correction.

OPINION

I.

Abu-Ali Abdur'Rahman (formerly James Lee Jones) has a long history of violent, anti-social behavior. In February 1986, while he was on parole, Mr. Abdur'Rahman and Devalle Miller entered the duplex of Patrick Daniels and Norma Norman under the pretext of making a drug purchase. They bound their victims with duct tape about their hands, feet, eyes, and mouths. After taking Mr.

Daniels's bank card, $300 of Ms. Norman's money, and some marijuana found in a sofa, Mr. Abdur'Rahman told Mr. Daniels that he was going to teach him a lesson and then stabbed him six times in the chest with a butcher knife while Mr. Daniels pleaded for his life. Mr. Abdur'Rahman also stabbed Ms. Norman several times in the back, and then he and Mr. Miller fled, leaving the knife in Ms. Norman's back. Mr. Daniels died as a result of his wounds, but Ms. Norman survived.

In July 1986, a Davidson County grand jury indicted Mr. Abdur'Rahman for first degree murder, assault with intent to commit first degree murder, and armed robbery.[1] In 1987, a jury found Mr. Abdur'Rahman guilty of all three offenses and sentenced him to death for the murder conviction and consecutive life sentences for the two remaining convictions. The Tennessee Supreme Court affirmed the convictions,[2] and the United States Supreme Court denied Mr. Abdur'Rahman's petition for writ of certiorari.[3] The Criminal Court for Davidson County thereafter denied Mr. Abdur'Rahman's petition for post-conviction relief. The Tennessee Court of Criminal Appeals affirmed the decision,[4] and both the Tennessee Supreme Court and the United States Supreme Court declined to review the case.[5]

The Criminal Court for Davidson County set Mr. Abdur'Rahman's execution date for June 10, 1996. On April 23, 1996, Mr. Abdur'Rahman triggered what has proved to be protracted proceedings in federal court by filing a pro se petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee.[6] In April 1998, the District Court concluded that Mr. Abdur'Rahman had received ineffective assistance of counsel at the sentencing phase of his 1987 trial and vacated Mr. Abdur'Rahman's death sentence.[7] A divided panel of the United States Court of Appeals for the Sixth Circuit reversed this decision two years later,[8] and the United States Supreme Court declined to review the case.[9]

Immediately after the United States Supreme Court declined to consider his case, Mr. Abdur'Rahman returned to the Sixth Circuit and the District Court seeking relief on the ground of

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[1]The grand jury issued a superceding indictment on March 27, 1987.

[2]*State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

[3]*Jones v. Tennessee*, 498 U.S. 908, 111 S. Ct. 280 (1990).

[4]*Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

[5]*Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Aug. 28, 1995); *Jones v. Tennessee*, 516 U.S. 1122, 116 S. Ct. 933 (1996).

[6]The District Court later appointed counsel for Mr. Abdur'Rahman.

[7]*Abdur'Rahman v. Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998).

[8]*Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000). The court also denied Mr. Abdur'Rahman's petition for rehearing and suggestion for rehearing en banc but stayed its mandate to permit him to file a petition for writ of certiorari in the United States Supreme Court.

[9]*Abdur'Rahman v. Bell*, 534 U.S. 970, 122 S. Ct. 386, *reh'g denied*, 534 U.S. 1063, 122 S. Ct. 661 (2001).

prosecutorial misconduct. Based on an intervening United States Supreme Court decision[10] and the Tennessee Supreme Court's adoption of Tenn. S. Ct. R. 39, he requested the Sixth Circuit to vacate its judgment and remand the case to the District Court. He also filed a Fed. R. Civ. P. 60(b) motion in the District Court seeking relief from the judgment. In late 2001, the District Court declined to consider the motion and transferred it to the Sixth Circuit.[11]

On January 15, 2002, the Tennessee Supreme Court set April 10, 2002 as the date for Mr. Abdur'Rahman's execution.[12] On March 26, 2002, Mr. Abdur'Rahman was presented with the statutorily mandated choice between methods of execution and declined to make a choice. By operation of law, lethal injection became the method for carrying out Mr. Abdur'Rahman's execution.[13] On April 3, 2002, Mr. Abdur'Rahman requested the Commissioner of Correction to issue a declaratory order pursuant to Tenn. Code Ann. § 4-5-223 (1998) regarding the "constitutionality, legality and applicability" of the Department of Correction's lethal injection protocol.[14]

Thereafter, the Sixth Circuit issued two summary orders declining to grant the requested relief and denying all of Mr. Abdur'Rahman's pending motions because his Fed. R. Civ. P. 60(b) motion amounted to a second or successive petition for writ of habeas corpus. Mr. Abdur'Rahman filed another petition for writ of certiorari in the United States Supreme Court. On April 8, 2002,

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[10] *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999).

[11] *Abdur'Rahman v. Bell*, No. 3:96-0380, 2001 WL 1782874 (M.D. Tenn. Nov. 27, 2001). The District Court also denied Mr. Abdur'Rahman's application for a certificate of appealability. *Abdur'Rahman v. Bell*, No. 3:96-0380, 2001 WL 1782875 (M.D. Tenn. Dec. 4, 2001).

[12] The execution date was later reset for June 18, 2004.

[13] Tenn. Code Ann. § 40-23-114(a), (b) (2003).

[14] In addition to this administrative proceeding, Mr. Abdur'Rahman initiated a judicial challenge to the lethal injection protocol. On April 4, 2002, he filed a petition in the Circuit Court for Davidson County seeking to reopen his post-conviction case to raise, among other issues, the constitutionality of lethal injection. *Abdur'Rahman v. State*, No. 87-W-417. On April 25, 2002, the circuit court dismissed the petition with regard to all issues except the constitutionality of lethal injection. On June 18, 2002, after the Tennessee Court of Criminal Appeals declined to consider Mr. Abdur'Rahman's application for permission to appeal because the circuit court had not disposed of all the issues raised in his petition, the circuit court entered an order denying Mr. Abdur'Rahman's petition in its entirety. The Tennessee Court of Criminal Appeals affirmed the trial court in all respects. With regard to the constitutional challenge to the lethal injection protocol, the court reasoned that "the post-conviction statute does not authorize reopening the Defendant's petition on this ground." *Abdur'Rahman v. State*, No. M2002-01561-CCA-R28-PD (Tenn. Crim App. Order Sept. 18, 2002). On December 12, 2002, the circuit court entered an order dismissing Mr. Abdur'Rahman's constitutional challenge to the lethal injection protocol and recognizing that his Tenn. Code Ann. § 4-5-223 petition for a declaratory order would provide a vehicle for judicial review of the constitutional issue. The Tennessee Supreme Court declined to review the Court of Criminal Appeals' order. *Abdur'Rahman v. State*, No. M2002-01561-SC-R11-PD (Orders Jan. 27 & Feb. 19, 2003). The United States Supreme Court later dismissed Mr. Abdur'Rahman's certiorari petition pursuant to Sup. Ct. R. 46.2. *Abdur'Rahman v. Bell*, 538 U.S. 973, 123 S. Ct. 1780 (2003).

the Court stayed Mr. Abdur'Rahman's execution,[15] and on April 22, 2002, granted certiorari to consider two issues regarding the consideration of federal habeas corpus petitions.[16]

On May 28, 2002, the Commissioner of Correction denied Mr. Abdur'Rahman's request for a declaratory order regarding the lethal injection protocol. On July 26, 2002, Mr. Abdur'Rahman filed a Tenn. Code Ann. § 4-5-225 (1998) petition in the Chancery Court for Davidson County challenging the Tennessee Department of Correction's lethal injection protocol. He asserted that the procedure used to adopt the protocol violated the Uniform Administrative Procedures Act and the open meetings law.[17] He also asserted that the protocol involved the unlawful practice of medicine and that it was contrary to the Nonlivestock Animal Human Death Act.[18] Finally, he asserted that the protocol violated public policy and the prohibitions against cruel and unusual punishments in Tenn. Const. art. I, § 16 and U.S. Const. amend. VIII. The State filed an answer denying Mr. Abdur'Rahman's constitutional claims and moved to dismiss his remaining claims on the ground that they failed to state a claim upon which relief could be granted.

There was a hiatus in the state proceeding while the parties turned their attention to the proceedings in the United States Supreme Court. The Court heard oral arguments on November 6, 2002. However, on December 10, 2002, the Court filed a per curiam order dismissing the writ of certiorari as improvidently granted.[19] After the case was returned to the Sixth Circuit, a majority of the court decided to rehear the case en banc. Accordingly, the court vacated its earlier judgment and granted Mr. Abdur'Rahman another stay of execution pending its consideration of the case. The case remains pending in the Sixth Circuit.

On March 28, 2003, Mr. Abdur'Rahman filed what proved to be an unsuccessful petition for writ of habeas corpus in the Circuit Court for Davidson County.[20] On May 6, 2003, the chancery court granted the State's motion to dismiss all the counts of Mr. Abdur'Rahman's Tenn. Code Ann. § 4-5-225 petition except for his constitutional claims. Following a bench trial on May 29, 2003, the chancery court filed a memorandum and order on June 2, 2003 concluding that the lethal injection protocol did not violate Article I, § 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. Mr. Abdur'Rahman appeals both from the order

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[15] *Abdur'Rahman v. Bell*, 535 U.S. 981, 122 S. Ct. 1463 (2002).

[16] *Abdur'Rahman v. Bell*, 535 U.S. 1016, 122 S. Ct. 1605 (2002).

[17] Mr. Abdur'Rahman later voluntarily dismissed his open meetings law claim.

[18] Tenn. Code Ann. § 44-17-301 to -303 (Supp. 2003).

[19] *Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S. Ct. 594 (2002), *pet. reh'g denied*, 537 U.S. 1227, 123 S. Ct. 1780 (2003).

[20] The circuit court dismissed the petition on March 31, 2003. The Tennessee Court of Criminal Appeals affirmed the dismissal in accordance with Tenn. Crim. App. R. 20. *State v. Abdur'Rahman*, No. M2003-00968-CCA-R3-CO (Tenn. Crim. App. Order June 6, 2003). The Tennessee Supreme Court declined to review the case on October 6, 2003, and the United States Supreme Court likewise denied Mr. Abdur'Rahman's certiorari petition. *Abdur'Rahman v. Tennessee*, ___ U.S. ___, 124 S. Ct. 2066 (2004).

granting the State's motion to dismiss and from the memorandum and order upholding the constitutionality of the lethal injection protocol.

II.
THE DEPARTMENT OF CORRECTION'S LETHAL INJECTION PROTOCOL

The Tennessee General Assembly authorized executions by lethal injection beginning in May 1998.[21] Unlike other state legislatures that provided specific directions regarding the lethal injection procedure, the Tennessee General Assembly left it entirely to the Department of Correction "to promulgate necessary rules and regulations to facilitate the implementation" of execution by lethal injection. Tenn. Code Ann. § 40-23-114(c). In June 1998, the Commissioner of Correction assembled a Lethal Injection Project Team. The team consisted of six employees of the Department, including the warden of the facility in which executions are carried out. None of these persons had medical training. The team obtained information from other states that had authorized and carried out executions by lethal injection and conducted on-site visits in Texas and Indiana.

The team identified the drugs most commonly used by other states to carry out executions by lethal injections. In July 1998, the team sought recommendations from the Department's Director of Health Services regarding the combination of drugs that should be used in Tennessee. The director responded that Sodium Pentothal,[22] pancuronium bromide ("Pavulon"),[23] and potassium chloride[24] "are apparently the drugs of choice for lethal injections and should be adequate for use in Tennessee as well."[25] He also advised that all these drugs, as well as the supplies and other fluids, were available through the Department's central pharmacy. Later, after one of the Department's physicians reviewed the suggested drugs with an anesthesiologist, the director reported to the team that the physician "confirms that the drugs and dosages listed are correct for a lethal injection. He [the physician] advised that the Sodium Pentothal should be administered first, then the Pavulon, and then the potassium chloride. The lines should be flushed with saline before each new drug is injected."

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[21] Act of Apr. 29, 1998, ch. 982, 1998 Tenn. Pub. Acts 757 (codified as amended at Tenn. Code Ann. § 40-23-114 (2003)). The Tennessee General Assembly amended this act two years later, Act of Mar. 29, 2000, ch. 614, 2000 Tenn. Pub. Acts 1854, but these amendments have no direct bearing on the issues raised in this appeal.

[22] Sodium Pentothal, also known as sodium thiopental, is an ultrashort-acting barbituate. It is a nonspecific central nervous system depressant that is customarily used to induce general anesthesia when administered intravenously. It works quickly, but its effects are relatively short-acting. A clinical dose will induce general anesthesia for around 10 to 30 minutes. In addition to its effects on the central nervous system, it causes cadiovascular and respiratory depression.

[23] Pavulon is a nondepolarizing, neuromuscular blocking agent that produces paralysis. It does not have sedative or analgesic effects. A lethal dose of Pavulon paralyzes the diaphragm and lungs causing breathing to cease.

[24] Potassium chloride is a salt that in high doses interrupts the electrical signaling essential to normal heart function. A high dose of potassium chloride administered intravenously causes cardiac arrest and rapid death.

[25] The history of how these three drugs became the drugs of choice is recounted in: Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63, 90-100 (2002) ("Denno").

Based on its research, the team decided to pattern Tennessee's three-drug protocol after Texas's protocol because Texas had the most experience with carrying out executions by lethal injection. The team's protocol adopted the Director of Health Services' recommendations regarding the three drugs and the order of their administration but increased the dosages of the drugs over the dosages that the Department's physician and the consulting anesthesiologist had already determined would be fatal. The team completed most of its work by December 1998 and updated the Department's "Execution Manual" to include the lethal injection protocol. After the execution of Robert Glen Coe by lethal injection on April 19, 2000, the Department conducted another review of these procedures based on its experience with Coe's execution.

The three-drug lethal injection protocol in the Department's Execution Manual[26] calls for the intravenous injection of three drugs in the following order and dosages using seven 60 cc syringes. The first syringe contains five grams of Sodium Pentothal mixed in solution with 50 cc of sterile water.[27] The second syringe contains 50 cc of saline solution.[28] The third and fourth syringes each contain 50 cc of Pavulon at 1mg/ml.[29] The fifth syringe contains 50 cc of saline solution.[30] The sixth and seventh syringes each contain 50 cc of potassium chloride.[31]

Shortly before the execution, the prisoner is secured to a gurney, and the gurney is rolled into the death chamber. Once in the death chamber, arm extensions are attached to the gurney, and the prisoner's arms are secured to the arm extensions. An IV team consisting of two certified paramedics and one correctional officer then inserts a catheter into the veins of both of the prisoner's inner arms just above the elbow.[32] These catheters are connected by surgical tubing to a bag of saline solution hung from a stand mounted on the ceiling of an adjacent room where the executioner is located. The executioner is able to view the prisoner through a window and with a closed-circuit television camera focused on the area where the catheters have been inserted.

At the warden's signal, the executioner inserts the first syringe containing the Sodium Pentothal into a "Y" connector in the surgical tubing and "pushes" the entire contents of the syringe into the saline solution flowing into the prisoner's vein. Once the first syringe is emptied, the executioner proceeds with the remaining syringes until all seven syringes have been emptied in sequence. Following the injection of the contents of the final syringe, the blinds on the window between the death chamber and the room where the witnesses are seated are closed, and the state

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[26]The version of the manual under scrutiny in this case is dated July 25, 2002.

[27]To insure its potency, the Sodium Pentothal is mixed shortly before the execution and is placed in a yellow syringe marked with the number "1."

[28]This syringe is colored black and is marked with the number "2."

[29]These two syringes are colored blue and are marked with the numbers "3" and "4" respectively.

[30]This syringe, like syringe number 2, is colored black and is marked with the number "5."

[31]These two syringes are colored red and are marked with the numbers "6" and "7" respectively.

[32]One of the catheters is used as a backup in case something goes wrong with the first catheter.

medical examiner then examines the prisoner to determine whether he or she is dead. If the prisoner is dead, the physician pronounces him or her dead.[33] The body is then removed from the death chamber and transported to the office of the state medical examiner where an autopsy is performed.

III.
THE APPLICATION OF THE RULE-MAKING PROVISIONS OF THE UNIFORM ADMINISTRATIVE PROCEDURES ACT TO THE ADOPTION OF THE LETHAL INJECTION PROTOCOL

Mr. Abdur'Rahman first takes issue with the process that the Department used to prepare and adopt its lethal injection protocol. He insists that the Department should have promulgated this protocol using the rule-making procedures found in the Uniform Administrative Procedures Act. He also criticizes the Department for developing the lethal injection protocol "entirely outside the public's eye." Mr. Abdur'Rahman's arguments lack legal foundation.

In 1998, the Tennessee Supreme Court determined that the Department of Correction was not required to follow the Uniform Administrative Procedures Act's rule-making procedures to adopt its Uniform Disciplinary Policy. Noting that Tenn. Code Ann. § 4-6-102 (1998) vested broad management power in the Department, the court held (1) that formal rule-making proceedings were ill-suited to the management of prisons and (2) that the Uniform Disciplinary Policy did not fit within the Uniform Administrative Procedures Act's definition of "rule" because it concerned the internal management of state government and did not affect the private rights, privileges, or procedures available to the public. *Mandela v. Campbell*, 978 S.W.2d 531, 533-35 (Tenn. 1998).

The *Mandela v. Campbell* decision dealt only with the Department's Uniform Disciplinary Policy. However, on the eve of the execution of Robert Glen Coe, the Tennessee Supreme Court extended the reach of its *Mandela v. Campbell* decision to the Department of Correction's lethal injection protocol. Despite the specific language in Tenn. Code Ann. § 40-23-114(c) directing the Department "to promulgate necessary rules and regulations" to facilitate executions by lethal injection, the court held that the Department's lethal injection protocol is not a "rule under the UAPA" because it "fits squarely" within the exceptions to the Uniform Administrative Procedures Act in Tenn. Code Ann. § 4-5-102(10)(A), (D) (1998). *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. Order Apr. 19, 2000).

Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Payne v. Johnson*, 2 Tenn. Cas. (Shannon) 542, 543 (1877). Thus, this court is bound to adhere to the decisions of the Tennessee Supreme Court. *Bing v. Baptist Mem'l Hosp.*, 937 S.W.2d 922, 925 (Tenn. Ct. App. 1996); *Estate of Schultz v. Munford, Inc.*, 650 S.W.2d 37, 39 (Tenn. Ct. App. 1982). The court has even admonished us that we are not free to disregard its obiter dictum when the court is speaking directly on the matter before it and it is seeking to give guidance to the bench and bar. *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 881-82 (Tenn. 1996).

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[33] In Robert Glen Coe's execution by lethal injection on April 19, 2000, the injection of the drugs began at 1:32 a.m. Mr. Coe was examined by a physician at 1:36 a.m. and was pronounced dead at 1:37 a.m.

The Tennessee Supreme Court's conclusion that the Department's lethal injection protocol need not be promulgated as a rule in accordance with the Uniform Administrative Procedures Act is contained in an unpublished order. While some may question the precedential value of an unpublished order, even an unpublished Tennessee Supreme Court order, we do not. Applying the twin criteria in *Holder v. Tennessee Selection Comm'n*, we conclude that the *Coe v. Sundquist* order directly addressed the issue of the application of the Uniform Administrative Procedures Act's rule-making requirements to the Department's lethal injection protocol and that the court intended its decision to give guidance to the bench and bar. Accordingly, based on the Court's order in *Coe v. Sundquist*, we concur with the trial court's conclusion that the Department was not required to promulgate its lethal injection protocol as a rule under the Uniform Administrative Procedures Act.

The conclusion that the protocol need not be promulgated as a rule also disposes of Mr. Abdur'Rahman's complaint that the Department developed the protocol outside of the public's eye. Because the Uniform Administrative Procedures Act is inapplicable, no notice and public comment is required. To the extent that this argument is an attempt to resurrect Mr. Abdur'Rahman's claim that the Department violated Tenn. Code Ann. § 8-44-102 (2002), we note that he voluntarily dismissed that claim in the trial court on December 2, 2002. Parties cannot advance claims or defenses on appeal that they did not pursue at trial. *Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn. 2000); *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, 522 (Tenn. Ct. App. 2002).

IV.
THE APPLICATION OF THE NONLIVESTOCK ANIMAL HUMANE DEATH ACT

Mr. Abdur'Rahman asserts next that the inclusion of Pavulon in the Department's three-drug lethal injection protocol violates the Nonlivestock Animal Humane Death Act, Tenn. Code Ann. §§ 44-17-301 to -303 (Supp. 2003). He asserts that he is a "nonlivestock animal" as defined in Tenn. Code Ann. § 39-14-201(3) (2003),[34] and, therefore, that Pavulon cannot be included in the lethal injection protocol because Tenn. Code Ann. § 44-17-303(c) prohibits the use of "a neuromuscular blocking agent" for the purpose of euthanizing nonlivestock animals. Like the trial court, we have concluded that the Nonlivestock Animal Humane Death Act does not apply to the execution of a human being by lethal injection pursuant to Tenn. Code Ann. § 40-23-114.

A.

In 1980, the Tennessee General Assembly enacted the Dog and Cat Humane Death Act.[35] The purpose of the Act was to facilitate humane euthanasia of dogs and cats by permitting animal shelters and pounds to obtain and use sodium pentobarbital. In addition to sodium pentobarital, the

[34]Tenn. Code Ann. § 39-14-201(3) defines a "non-livestock animal" as "a pet normally maintained in or near the household or households of its owner or owners, other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as 'livestock' pursuant to this part." Specifically, Mr. Abdur'Rahman insists that he is a "domesticated animal."

[35]Act of Feb. 4, 1980, ch. 482, 1980 Tenn. Pub. Acts 87 (formerly codified at Tenn. Code Ann. § 44-17-301 to -305 (2000)).

Act expressly permitted euthanasia of dogs and cats using carbon monoxide, chloroform, nitrogen chambers, other barbiturates, and a drug referred to as T-61.[36] Tenn. Code Ann. § 44-17-303 (repealed).

In 2001, the Tennessee General Assembly replaced the Dog and Cat Humane Death Act with the present Nonlivestock Animal Humane Death Act.[37] By its plain terms, the Act applies only to "public and private agencies . . . operated for the collection, care and/or euthanasia of stray, neglected, abandoned or unwanted nonlivestock animals." Tenn. Code Ann. § 44-17-302. The Act permits euthanasia using "[s]odium pentobarbital and such other agents as may be specifically approved by the rules of the board of veterinary medicine," Tenn. Code Ann. § 44-17-303(a), and specifically prohibits the use of several substances, including "neuromuscular blocking agent[s]." Tenn. Code Ann. § 44-17-303(c).[38]

B.

The responsibility for determining what a statute means rests with the courts. *Roseman v. Roseman*, 890 S.W.2d 27, 29 (Tenn. 1994); *Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 601 (Tenn. Ct. App. 1999). We must ascertain and then give the fullest possible effect to the General Assembly's purpose in enacting the statute as reflected in the statute's language. *Stewart v. State*, 33 S.W.3d 785, 790-91 (Tenn. 2000); *Lavin v. Jordon*, 16 S.W.3d 362, 365 (Tenn. 2000). In doing so, we must avoid constructions that unduly expand or restrict the statute's application. *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62 S.W.3d 123, 127-28 (Tenn. 2001); *Patterson v. Tennessee Dep't of Labor & Workforce Dev.*, 60 S.W.3d 60, 64 (Tenn. 2001); *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001). Our goal is to construe a statute in a way that avoids conflict and facilitates the harmonious operation of the law. *Frazier v. East Tenn. Baptist Hosp.*, 55 S.W.3d 925, 928 (Tenn. 2001); *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000).

Our construction of a statute is more likely to conform with the General Assembly's purpose if we approach the statute presuming that the General Assembly chose its words purposely and deliberately, *Tidwell v. Servomation-Willoughby Co.*, 483 S.W.2d 98, 100 (Tenn. 1972); *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 151 (Tenn. Ct. App. 2001), and that the words chosen

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[36] T-61 is another name for Tanax, a solution with three components (embutramide, mebenzonium iodide, and tetracaine hydrochloride) used to euthanize pets and laboratory animals.

[37] Act of April 5, 2001, ch. 194, 2001 Tenn. Pub. Acts 114.

[38] The statute does not state clearly whether the prohibition regarding neuromuscular blocking agents is limited to the use of these agents as the sole agents for euthanasia. While a 1993 report by the American Veterinary Medical Association's Panel on Euthanasia stated that combining a neuromuscular blocking agent with another approved agent such as sodium pentobarbital is not acceptable, *1993 Report of the AVMA Panel on Euthanasia*, 202 JAVMA 229 (Jan. 15, 1993), *available at* http://www.nal.usda.gov/awic/pubs/noawicpubs/avmaeuth93.htm, the same panel concluded in 2000 that the use of neuromuscular blocking agents was unacceptable only when used as the sole agent for euthanasia. *2000 Report of the AVMA Panel on Euthanasia*, 218 JAVMA 669, 681, 696 (Mar. 1, 2001), *available at* http://www.avma.org/resources/euthanasia.pdf.

by the General Assembly convey the meaning the General Assembly intended them to convey. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d at 83; *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Thus, we must construe statutes as we find them, *Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948); *Pacific Eastern Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 954 (Tenn. Ct. App. 1995), and our search for a statute's purpose must begin with the words of the statute itself. *Blankenship v. Estate of Bain*, 5 S.W.3d 647, 651 (Tenn. 1999); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001).

We must give a statute's words their natural and ordinary meaning unless the context in which they are used requires otherwise. *Frazier v. East Tenn. Baptist Hosp.*, 55 S.W.3d at 928; *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *State v. Fitz*, 19 S.W.3d 213, 216 (Tenn. 2000). Because words are known by the company they keep, *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d at 754-55, we should construe the words in a statute in the context of the entire statute and in light of the statute's general purpose. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994); *Wachovia Bank of N.C. v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000). When the meaning of statutory language is clear, we must interpret it as written, *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001); *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 629-30 (Tenn. 2000), rather than using the tools of construction to give the statute another meaning. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d at 83; *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000).

The tasks of statutory construction and applying a statute to a particular set of facts involve questions of law rather than questions of fact. *Patterson v. Tennessee Dep't of Labor and Workforce Dev.*, 60 S.W.3d at 62; *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998). Accordingly, appellate courts must review a trial court's construction of a statute or application of a statute to a particular set of facts de novo without a presumption of correctness. *State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000); *Mooney v. Sneed*, 30 S.W.3d at 306.

C.

The logic of Mr. Abdur'Rahman's interpretation of the Nonlivestock Animal Humane Death Act leads to absurd results. If he is a nonlivestock animal for the purpose of the Nonlivestock Animal Humane Death Act, then his execution may only be carried out by a licensed veterinarian, a veterinarian technician, or a shelter employee who has successfully completed a euthanasia-technician certification course. Tenn. Code Ann. § 44-17-303(d). Because our task is to employ the canons of construction to make sense rather than nonsense out of statutes,[39] we reject Mr. Abdur'Rahman's interpretation of the Nonlivestock Animal Humane Death Act.

Both the plain language and the legislative history of the Nonlivestock Animal Humane Death Act demonstrate that the General Assembly did not intend the Act to apply to human beings.

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[39] *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101, 111 S. Ct. 1138, 1148 (1991); *McClellan v. Board of Regents*, 921 S.W.2d 684, 689 (Tenn. 1996); *Mercy v. Olsen*, 672 S.W.2d 196, 200 (Tenn. 1984).

The Act was amended in 2001 for two reasons – to respond to the death of a Chattanooga animal shelter worker who died in a gas chamber accident and to revise and modernize the former statute in light of the acceptance of sodium pentobarbital to euthanize animals. We find no indication in the Act's legislative history that the General Assembly entertained any notion that this Act would apply to human beings.

This conclusion is borne out by the Act's plain language. First, the Department of Correction is plainly not a "public . . . agenc[y] . . . operated for the collection, care and/or euthanasia of stray, neglected, abandoned or unwanted nonlivestock animals." Second, human beings are not "domesticated animals" and, therefore, are not nonlivestock animals as defined in Tenn. Code Ann. § 39-14-201(3). Third, execution by lethal injection is not by definition equivalent to "euthanasia" as that word is commonly applied to human beings.[40]

V.
THE APPLICATION OF LICENSING AND REGULATORY REQUIREMENTS

Mr. Abdur'Rahman also challenges the Department's lethal injection protocol because it envisions that persons other than licensed physicians and nurses will perform procedures that, in a clinical setting, would normally be performed only by physicians and nurses. He also argues that the protocol's procedures for obtaining, mixing, and administering the Sodium Pentothal violate the Tennessee Drug Control Act of 1989[41] and the Tennessee Pharmacy Practice Act of 1996.[42] These technical licensure and regulatory arguments overlook two fundamental points.[43] First, carrying out an execution by lethal injection is not a therapeutic procedure associated with the healing arts. Second, the Tennessee General Assembly's grant of authority to the Department in Tenn. Code Ann. § 40-23-114(c) is broad enough to enable the department to carry out an execution by lethal injection without the use of trained medical professionals and without complying strictly with the regulatory constraints normally applicable to the use of drugs in a clinical setting.

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[40]The common meaning of "euthanasia" when applied to human beings is "the intentional putting to death of a person with an incurable or painful disease intended as an act of mercy." PDR Medical Dictionary 606 (1995); see also Stedman's Illustrated Medical Dictionary 494 (5th Unabridged Lawyers' Ed. 1982); Webster's Third New Int'l Dictionary 786 (1971).

[41]Tenn. Code Ann. §§ 39-17-401 to -451 (2003).

[42]Tenn. Code Ann. §§ 63-10-401 to -412 (1997 & Supp. 2003).

[43]The United States Supreme Court has also found similar regulatory arguments to be without merit. A group of prisoners sentenced to death by lethal injection in Oklahoma and Texas sought to require the FDA to commence enforcement actions to prevent the use of the drugs in violation of the Federal Food, Drug, and Cosmetic Act. In upholding the FDA's refusal to take action against the states using the drugs, the Court noted that "[n]o colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case." *Heckler v. Chaney*, 470 U.S. 821, 838, 105 S. Ct. 1649, 1659 (1985).

A.
The Use of Licensed Medical Personnel

Nothing in Tenn. Code Ann. § 40-23-114 explicitly requires the Department to use licensed physicians or nurses to perform the procedures necessarily incident to an execution by lethal injection. In addition, nothing in the legislative history of the 1998 or 2000 legislation enabling executions by lethal injection indicates that the General Assembly envisioned that medical professionals would be directly involved in the lethal injection process.[44] If anything, the General Assembly may very well have anticipated that licensed medical professionals would not be involved directly in executions by lethal injection because of their professional association's long-standing position that it is unethical for physicians, physicians' assistants, and nurses to participate in executions.[45]

Extending the licensing requirements to executions by lethal injection would have the practical effect of frustrating the Tennessee General Assembly's considered decision to adopt execution by lethal injection as the primary method for carrying out capital punishment in Tennessee. Were these requirements applicable to executions by lethal injection, the Department's ability to carry out its statutory mandates would be undermined because many licensed medical professionals would decline to participate in the procedure. It was for this reason that the Tennessee Supreme Court noted that "no public policy is violated by allowing physicians or anyone else to participate in carrying out a lawful sentence." *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. Order Apr. 19, 2000).

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[44] The Tennessee General Assembly's chief reason for selecting lethal injection as Tennessee's method of execution was its concern that the federal courts might conclude that electrocution was cruel and unusual punishment. The United States Supreme Court had agreed to hear an Eighth Amendment challenge to execution by electrocution. *Bryan v. Moore*, 528 U.S. 960, 120 S. Ct. 394 (1999). However, in 2000, the Court dismissed the writ as being improvidently granted after Florida changed its method of execution from electrocution to lethal injection. *Bryan v. Moore*, 528 U.S. 1133, 120 S. Ct. 1003 (2000).

[45] As early as 1980, the American Medical Association's Council on Ethical and Judicial Affairs had concluded that a physician should not be a participant in a legally authorized execution. Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Opn. 2.06, *available at* http://www.ama-assn.org/ama/pub/category/print/8419.html (last modified July 22, 2002). Likewise, the American Nurses Association has concluded that participation in capital punishment is inconsistent with the ethical traditions of nursing and the ANA Code for Nurses. *See* Am. Nurses Assn., *Position Statements*: *Nurses' Participation in Capital Punishment* (December 8, 2994), *available at* http://www.nursingworld.org/readroom/position/ethics/etcptl.htm. The American Academy of Physician Assistants has likewise determined that participating in executions violates the ethical principle of beneficence. Am. Acad. of Phys. Assistants, *Guidelines for Ethical Conduct for the Physician Assistant Profession* (May 2000), *available at* http://www.aapa.org/images/GECINSERTATION.pdf. In an October 25, 1999 letter to the Commissioner of Correction, the Tennessee Medical Association pointed out that physicians could not ethically act in any way that would "assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned" and that participation included (1) consulting with or supervising the personnel involved in the lethal injection protocol, (2) selecting injection sites, (3) starting intravenous lines, (4) inspecting, testing, or maintaining the injection devices, or (5) prescribing, preparing, administering, or supervising the injection of the drugs. Despite these ethical admonitions, one state court has declined to find that a physician who participated in an execution could be disciplined for engaging in unethical conduct because the legislature had clearly authorized physicians to participate in the process. *Thorburn v. Department of Corrections*, 78 Cal. Rptr. 2d 584, 590 (Ct. App. 1998).

In light of the Department's broad authority in Tenn. Code Ann. § 40-23-114 to "facilitate the implementation" of executions by lethal injection, we have determined that the Department's lethal injection protocols are exceptions to and fall outside of licensing statutes providing that certain procedures must be performed by licensed healthcare professionals. The Department does not have a statutory obligation to use licensed medical personnel to carry out an execution by lethal injection. However, the licensing question aside, the experience and training of the persons participating in an execution by lethal injection is a relevant consideration when determining whether the protocol violates the prohibitions against cruel and unusual punishments in Article I, § 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution.

B.
The Application of the Tennessee Drug Control Act of 1989 and the Tennessee Pharmacy Practice Act of 1996

Both the Tennessee Drug Control Act of 1989 and the Tennessee Pharmacy Practice Act of 1996 govern the manner in which controlled substances, including Sodium Pentothal, may be dispensed in a clinical setting.[46] Because of Sodium Pentothal's high potential for abuse which can lead to severe dependence,[47] it may not be dispensed[48] without a written prescription except when a practitioner,[49] other than a pharmacy, is dispensing it directly to an ultimate user.[50] Tenn. Code Ann. § 53-11-308(A) (1999). All persons who distribute or dispense controlled substances must obtain an annual registration from the appropriate licensing board.[51]

Executions in Tennessee are carried out at the Riverbend Maximum Security Institution in Nashville. According to the warden of that facility, the three drugs required by the protocol are obtained through the central pharmacy at the Lois M. DeBerry Special Needs Facility in Nashville.

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[46]Sodium Pentothal is a Schedule II controlled substance. Tenn. Code Ann. § 39-17-408(e) (2003).

[47]Tenn. Code Ann. § 39-17-407(1), (3) (2003).

[48]Tenn. Code Ann. § 39-17-402(7) defines "[d]ispense" as "deliver[ing] a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery."

[49]The definition of "[p]ractitioner" in Tenn. Code Ann. § 39-17-402(22) is broad enough to include physicians, pharmacies, or other persons "licensed, registered or otherwise permitted to . . . dispense . . . or to administer a controlled substance in the course of professional practice."

[50]Tenn. Code Ann. § 39-17-402(25) defines an "[u]ltimate user" as "a person who lawfully possesses a controlled substance for the person's own use or for the use of a member of the person's household or for the administering to an animal owned by the person or by a member of the person's household."

[51]Tenn. Code Ann. § 53-11-302(a) (1999).

The warden is personally responsible for obtaining the drugs from the pharmacy prior to an execution, and the drugs remain under the warden's personal control at all times until they are used.[52]

The Sodium Pentothal is the only drug that requires preparation prior to an execution. It is delivered as a kit containing the drug in powder form and a vial of sterile water for mixing. Immediately prior to an execution, the warden reviews the expiration date of the Sodium Pentothal to assure that the drug has not expired. After determining that the drug is not out-of-date, either the warden, the executioner, or another trained person mixes 50 cc of the sterile water with the powdered drug according to the directions and then draws up the solution into the yellow syringe, which is labeled with the number "one" because it will be the first syringe used when the execution begins. This process takes place in the presence of other officials of the Department who are also familiar with the protocol.[53]

This procedure does not adhere to the generally applicable requirements for prescribing and dispensing controlled substances. For the purposes of these Acts, Riverbend's warden is neither a practitioner nor an ultimate user, and the Sodium Pentothal is dispensed without a written prescription signed by a practitioner. However, as with the licensure requirements discussed in the preceding section, the executions by lethal injection authorized by Tenn. Code Ann. § 40-23-114 are exceptions to prescription and dispensing requirements of both the Tennessee Drug Control Act of 1989 and the Tennessee Pharmacy Practice Act of 1996.

The chief purpose of these Acts is to prevent the illegal sale and use of controlled substances.[54] There is no indication in the language or legislative history of either Act that they were intended to apply to the State when it is carrying out a lawfully imposed death sentence. In fact, executions by lethal injection were not authorized in Tennessee when either Act was passed. Therefore, the General Assembly could not have envisioned that the restrictions in the Act would govern the State's use of controlled substances in the context of executions by lethal injection.

While both the Tennessee Drug Control Act of 1989 and the Tennessee Pharmacy Practice Act of 1996 apply to the manufacture, distribution, and dispensing of controlled substances, they do not purport to control or regulate how these drugs should be used by persons who have a lawful right to use them. Unlike other states whose statutes contain instructions for carrying out an execution by lethal injection, the Tennessee General Assembly left these details entirely to the Department. Therefore, while evidence regarding the manner in which the Department obtains and prepares the Sodium Pentothal is relevant with regard to Mr. Abdur'Rahman's assertion that the Department's lethal injection protocol violates Tenn. Const. art. I, § 16 and U.S. Const. amend. VIII, the fact that

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[52] The warden testified that the drugs are kept in a secure locker in Riverbend's armory complex and that he has the only keys to this locker.

[53] The warden testified that he personally mixed the Sodium Pentothal and drew it up into the proper syringe in preparation for the only lethal injection ever carried out in Tennessee.

[54] Like its predecessor, the Tennessee Drug Control Act of 1971, the Tennessee Drug Control Act of 1989 establishes a "comprehensive system of drug and drug abuse control." *See* Act of May 3, 1971, ch. 163, caption, 1971 Tenn. Pub. Acts 366, 366.

the protocol does not comply with either the Tennessee Drug Control Act of 1989 and the Tennessee Pharmacy Practice Act of 1996 does not provide legal grounds for invalidating the protocol.

VI.
THE CRUEL AND UNUSUAL PUNISHMENT CLAIMS

Mr. Abdur'Rahman's principal argument on this appeal is that the Department's lethal injection protocol violates the prohibitions against cruel and unusual punishments in both Tenn. Const. art. I, § 16 and U.S. Const. amend. VIII. While he does not argue that execution by lethal injection is per se cruel and unusual, he does argue that the Department's protocol is unconstitutional for essentially two other reasons. First, he asserts that the use of both Pavulon and potassium chloride poses a serious risk of unreasonable and unnecessary physical pain and psychological suffering. Second, he asserts that the protocol, viewed in its entirely, does not contain the minimum safeguards required to ensure that mistakes and errors will not cause an inhumane death. We have determined that Mr. Abdur'Rahman has failed to prove that executions in Tennessee carried out in accordance with the Department's protocol constitute cruel and unusual punishments.

A.

Neither the Tennessee Supreme Court nor the United States Supreme Court has addressed the question of whether execution by lethal injection in general, or Tennessee's protocol for carrying out an execution by lethal injection in particular, amounts to cruel and unusual punishment.[55] Accordingly, we begin by identifying the standards used to determine whether a particular punishment violates Tenn. Const. art. I, § 16 or U.S. Const. amend. VIII.

The Constitution of Tennessee has always recognized that the death penalty, in some form, is an appropriate punishment in certain circumstances.[56] *State v. Black*, 815 S.W.2d 166, 168 (Tenn. 1991). However, like its federal and state counterparts, the Constitution of Tennessee has also placed limits on the legislature's power to punish persons who commit crimes. *State v. Black*, 815 S.W.2d at 192 (Reid, C.J., dissenting in part). These limits are found in Tenn. Const. art. I, § 16, which states, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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[55]The Tennessee Court of Criminal Appeals has upheld the constitutionality of executions by lethal injection on two occasions without much analysis. *State v. Robinson*, No. W2001-01299-CCA-R3-DD, 2003 WL 21946735, at *49 (Tenn. Crim. App. Aug. 13, 2003), *perm. app. granted* (Tenn. Jan. 26, 2004); *State v. Suttles*, No. 03C01-9801-CR-00036, 1999 WL 817205, at *14 (Tenn. Ct. App. Sept. 29, 1999), *aff'd* 30 S.W.3d 252 (Tenn. 2000). However, the Tennessee Supreme Court has specifically declined to address the question. *State v. Suttles*, 30 S.W.3d at 264; *State v. Morris*, 24 S.W.3d 788, 797 n.8 (Tenn. 2000).

[56]Hanging was the original method of execution in Tennessee. In 1913, electrocution replaced hanging as the sole method of execution. Act of Sept. 27, 1913, ch. 36, 1913 Tenn. Pub. Acts 515. In 2000, lethal injection replaced electrocution as the primary method of execution in Tennessee except for certain prisoners who remain eligible to opt for electrocution.

The prohibition against "cruel and unusual punishments" in the Constitution of Tennessee shares a common origin with similar prohibitions in the United States Constitution and other state constitutions, which can be traced back to Magna Carta and the Declaration of Rights of 1688.[57] As the Tennessee Supreme Court has noted, the wording of Tenn. Const. art. I, § 16 is "nearly identical" to the prohibition against cruel and unusual punishment in U.S. Const. amend VIII.[58] *Van Tran v. State*, 66 S.W.3d 790, 799 (Tenn. 2001).

The Tennessee Supreme Court was initially hesitant to subject the General Assembly's choice of punishment for committing criminal acts to judicial scrutiny under Tenn. Const. art. I, § 16. *State v. Lasater*, 68 Tenn. 584, 587 (1877). Finally, over one century after statehood, the court confirmed that it had not only the authority but the duty, in proper cases, to review statutory criminal penalties to determine whether they imposed cruel and unusual punishments. *Brinkley v. State*, 125 Tenn. 371, 382-83, 143 S.W. 1120, 1122 (1911). The court did not, however, define the parameters of the protection afforded by Tenn. Const. art. I, § 16 or explain the analysis to be used in determining whether a particular punishment is cruel and unusual.

For the next seventy years, few cases raising issues under Tenn. Const. art. I, § 16 were brought to the court, and those that the court did consider were disposed of summarily without discussion. In 1962, the United States Supreme Court extended the application of the Eighth Amendment to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 1420-21 (1962). This decision provided a jurisprudential bridge between the case law construing the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. Accordingly, seventeen years later, the Tennessee Supreme Court held that the parameters of the Tennessee Constitution's prohibition against cruel and unusual punishments were precisely the same as the Eighth Amendment. *Cozzolino v. State*, 584 S.W.2d 765, 767 (Tenn. 1979).

This view of the scope of Tenn. Const. art. I, § 16 began to crumble as soon as the ink on the *Cozzolino* opinion was dry. In 1981, Chief Justice Brock conceded that he had erred by concurring in the portion of the *Cozzolino* opinion equating Tenn. Const. art. I, § 16 with the Eighth Amendment. *State v. Dicks*, 615 S.W.2d 126, 132-33 (Tenn. 1981). By 1991, every member of the Tennessee Supreme Court has eschewed *Cozzolino*. While recognizing that the wording of the two provisions was similar, the court asserted that this similarity did not foreclose an interpretation or application of Tenn. Const. art. I, § 16 that was more expansive than the United States Supreme Court's interpretation of the Eighth Amendment. *State v. Black*, 815 S.W.2d at 188, 193 (Reid, C.J., dissenting in part) (stating that "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards").

After declaring theoretical independence from the federal Eighth Amendment standards, the court adopted the New Jersey Supreme Court's three-part analysis based on the United States

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[57] John L. Bowers, Jr. & J. L. Boren, Jr., Note, *The Constitutional Prohibition Against Cruel and Unusual Punishment – Its Present Significance*, 4 Vand. L. Rev. 680, 682 (1951).

[58] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Supreme Court's Eighth Amendment analysis in *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925 (1976). *State v. Black*, 815 S.W.2d at 189 (citing *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987)). This analysis established that determining whether a particular punishment was cruel and unusual required the following three inquiries:

> First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?

State v. Ramseur, 524 A.2d at 210.[59] One year later, the court again looked to the United States Supreme Court and borrowed the analytical principles that the Court had fashioned to review proportionality claims. *State v. Harris*, 844 S.W.2d 601, 603 (Tenn. 1992).[60]

Most recently, the Tennessee Supreme Court has characterized the three-part test in *State v. Black* as "well-established." *Van Tran v. State*, 66 S.W.3d at 800 n.12.[61] Accordingly, for the purpose of our analysis in this case, we will use the three-part test in *State v. Black* as our starting point. In addition, like the majority of the Tennessee Supreme Court, we will use the United States Supreme Court's interpretations and applications of the Eighth Amendment to provide helpful guidance in the absence of more authoritative direction from the Tennessee Supreme Court.

Our interpretation and application of Tenn. Const. art. I, § 16 must also be guided by an awareness of the constitutional limitations on the courts' role in cases of this sort. *Gregg v. Georgia*, 428 U.S. at 174, 96 S. Ct. at 2925. We must defer to the General Assembly's broad authority to determine the types and limits of punishment of criminal offenses. *Stanford v. Kentucky*, 492 U.S. 361, 369-70, 109 S. Ct. 2969, 2975 (1989); *State v. Harris*, 844 S.W.2d at 603 (Daughtrey, J.,

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[59]The court's decision to adopt *Gregg v. Georgia's* analytical standards prompted two dissenting justices to complain that the court was continuing "to affirm sentences of death by ascertaining whether [Tennessee's] procedural and substantive law satisfies the latest national minimum standard." *State v. Black*, 815 S.W.2d at 192-93 (Reid, C.J., dissenting in part). The chief justice also admonished his colleagues that the court should "assert its full and independent authority under the State Constitution to assure that the process whereby a defendant is sentenced to death is essentially free of error." *State v. Black*, 815 S.W.2d at 194 (Reid, C.J., dissenting in part).

[60]The court's use of Justice Kennedy's standards prompted one of the justices who had dissented in *State v. Black* to chide the court for relying on Eighth Amendment principles "when federal law on this subject appears to be unsettled." *State v. Harris*, 844 S.W.2d at 604 (Daughtrey, J., dissenting). The chief justice did not participate in the decision.

[61]*Van Tran v. State* may be the first case in which the Tennessee Supreme Court actually found that Tennessee's constitutional prohibition against cruel and unusual punishment provided broader protection than the Eighth Amendment. The court held that executing mentally retarded persons was cruel and unusual punishment, even though the United States Supreme Court had not at that time held that it violated the Eighth Amendment. However, that very question was before the United States Supreme Court when *Van Tran v. State* was decided, and six months after the *Van Tran v. State* opinion was filed, the United States Supreme Court reached the same conclusion under the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 350, 122 S. Ct. 2242, 2252 (2002).

dissenting) (quoting *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983)). We may not act as legislators, *Gregg v. Georgia*, 428 U.S. at 175, 96 S. Ct. at 2926, and we must not allow our personal preferences regarding the wisdom of the legislation or our personal distaste for its subject matter to guide our judicial decisions. *Furman v. Georgia*, 408 U.S. 238, 411, 92 S. Ct. 2726, 2815 (Blackmun, J., dissenting); *Baldwin v. Knight*, 569 S.W.2d 450, 452 (Tenn. 1978); *Mayhew v. Wilder*, 46 S.W.3d 760, 785 (Tenn. Ct. App. 2001) (Koch, J., concurring). The Constitution of Tennessee and the United States Constitution are the sole sources of the principles of constitutional adjudication. Thus, a court's prerogative to review the General Assembly's decisions regarding the nature and extent of punishment for crime ends with an adjudication that the statute passes constitutional muster. *State v. Adkins*, 725 S.W.2d 660, 664 (Tenn. 1987).

B.

The three-part test in *State v. Black* is particularly applicable when courts are called upon to decide whether the legislature's chosen punishment fits a particular criminal offense or whether a punishment meted out by a judge or jury fits the criminal offense of a particular defendant. Accordingly, the courts have modified the analysis slightly in cases focusing on a particular method of execution. The Supreme Court of Connecticut, relying on *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544 (1910), fashioned a framework for addressing the constitutionality of a particular method of execution that includes the consideration of the following four factors:

> (1) whether the method of execution comported with the contemporary norms and standards of society; (2) whether it offends the dignity of the prisoner and society; (3) whether it inflicted unnecessary physical pain; and (4) whether it inflicted unnecessary psychological suffering.

State v. Webb, 750 A.2d 448, 454 (Conn. 2000).

Determining whether the mode of punishment conforms with contemporary norms and standards of decency is arguably the most critical factor of the analysis. *Van Tran v. State*, 66 S.W.3d at 801. The breadth and generality of the constitutional language indicate that the framers of both the Constitution of Tennessee and the United States Constitution anticipated that the courts would define the scope of the prohibition against cruel and unusual punishment. *State v. Black*, 815 S.W.2d at 188-89. Accordingly, the courts have interpreted the provisions in a flexible and dynamic manner. *Gregg v. Georgia*, 428 U.S. at 171, 96 S. Ct. at 2924; *Van Tran v. State*, 66 S.W.3d at 801. The prohibition against cruel and unusual punishment is not limited to the practices condemned at the end of the Eighteenth Century, *Stanford v. Kentucky*, 492 U.S. at 369-70, 109 S. Ct. at 2975; *Van Tran v. State*, 66 S.W.3d at 801, and historical acceptance of a particular mode of punishment is not necessarily dispositive. *Gregg v. Georgia*, 428 U.S. at 174 n.19, 96 S. Ct. at 2925 n.19; *State v. Black*, 815 S.W.2d at 188.

Despite the generality of the constitutional text, the courts are not without some guidance when applying the constitutional prohibitions against cruel and unusual punishments in a modern context. The application has been limited to those practices that are contrary to the "evolving

standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958); *Van Tran v. State*, 66 S.W.3d at 800. These standards should reflect the contemporary values and standards of decency of the American society as a whole. *Gregg v. Georgia*, 428 U.S. at 173, 96 S. Ct. at 2925. It is the courts' job to identify these standards, not to determine what they ought to be. *Stanford v. Kentucky*, 492 U.S. at 378, 109 S. Ct. at 2980.

Ascertaining contemporary community standards does not invite individual judges to base their constitutional decisions on their personal preferences or conceptions of decency. The judgment should be influenced by objective evidence to the greatest extent possible. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866 (1977); *Van Tran v. State*, 66 S.W.3d at 801. The most common sort of objective evidence relied upon by the courts are the statutes passed by society's elected representatives. *Penry v. Lynaugh*, 492 U.S. 302, 334, 109 S. Ct. 2934, 1955 (1989); *Gregg v. Georgia*, 428 U.S. at 173; 96 S. Ct. at 2925; *Van Tran v. State*, 66 S.W.3d at 801. The courts will decline to rest their decisions regarding a particular punishment on "uncertain foundations" such as opinion polls, the views of interest groups, or positions adopted by professional associations. *Stanford v. Kentucky*, 492 U.S. at 377, 109 S. Ct. at 2979.

The state and federal constitutional prohibitions against cruel and unusual punishments proscribe more than physically barbarous punishment. They embody broad and idealistic concepts of dignity, civilized standards, humanity, and decency. *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 (1978). The basic concept underlying these prohibitions is nothing less than human dignity. While the states and the federal government have the power to punish, Article I, § 16 of the Tennessee Constitution and the Eighth Amendment stand to assure that this power will be exercised within the limits of civilized standards. *Trop v. Dulles*, 356 U.S. at 100, 78 S. Ct. at 598. Rejection by society is a strong indication that a particular punishment does not comport with human dignity. *Furman v. Georgia*, 408 U.S. at 277, 92 S. Ct. at 2746.

Cruel and unusual punishments imply something inhuman and barbarous – more than the extinguishment of human life. *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 933 (1890). To pass constitutional muster, a particular punishment must not involve the unnecessary and wanton infliction of pain. *Gregg v. Georgia*, 428 U.S. at 173, 96 S. Ct. at 2927; *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002). Thus, punishments involving torture and lingering death violate both Tenn. Const. art. I, § 16 and the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. at 102, 97 S. Ct. at 290; Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994); *Moore v. State*, 771 N.E.2d 46, 55 (Ind. 2002).

The sort of cruelty at which both Tenn. Const. art. I, § 16 and the Eighth Amendment are aimed is the cruelty inherent in the method of punishment, not the suffering necessarily involved in any procedure employed to extinguish a human life. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-64, 67 S. Ct. 374, 376 (1947); *State v. Webb*, 750 A.2d at 454. These state and federal constitutional provisions do not require states to select the least severe method of punishment available as long as the method chosen is not cruelly inhuman. *Gregg v. Georgia*, 428 U.S. at 175, 96 S. Ct. at 2926. Arguments that more humane methods exist do not implicate constitutional concerns and are more properly addressed to the other branches of government. *State v. Black*, 815 S.W.2d at 178; *State v. Adkins*, 725 S.W.2d at 664.

Whether a particular lethal injection protocol constitutes cruel and inhuman punishment is a mixed question of law and fact. *Castillo v. Cameron County*, 238 F.3d 339, 347 (5th Cir. 2001); *Campbell v. Wood*, 18 F.3d at 681-82; *People v. Mantanez*, 119 Cal. Rptr. 2d 756, 758 (Ct. App. 2002); *State v. Webb*, 750 A.2d at 453. Accordingly, we will review the trial court's findings of fact in accordance with Tenn. R. App. P. 13(d). However, we reach our own independent conclusion regarding whether the Department's three-drug protocol is consistent with Tenn. Const. art. I, § 16 and the Eighth Amendment.

C.

Mr. Abdur'Rahman has the heavy burden of proving that a societal consensus against executions by lethal injection in general, or executions by lethal injection incorporating Pavulon or potassium chloride in particular, has emerged. *Gregg v. Georgia*, 428 U.S. at 175, 96 S. Ct. at 2926; *Van Tran v. State*, 66 S.W.3d at 832 (Barker, J., dissenting). Either society has set its face against lethal injections, or the use of Pavulon and potassium chloride, or it has not. *See Stanford v. Kentucky*, 492 U.S. at 378, 109 S. Ct. at 2979. We have determined that Mr. Abdur'Rahman has failed to prove that executions by lethal injection using either Pavulon or potassium chloride or both do not conform to contemporary norms or standards of decency.

For several decades now, medical experts have extolled lethal injection as the most humane method of execution. *State v. Hinchey*, 890 P.2d 602, 610 (Ariz. 1995); *Wheeler v. Commonwealth*, 121 S.W.3d 173, 186 (Ky. 2003); *People v. Stewart*, 520 N.E.2d 348, 358 (Ill. 1988). As a result, legislatures in thirty-seven of the thirty-eight states whose laws authorize capital punishment and the Congress of the United States have selected lethal injection as the sole or primary method of execution.[62] In addition, state and federal courts have consistently rejected arguments that execution by lethal injection is cruel and inhuman.[63] These legislative and judicial determinations provide compelling evidence of society's acceptance of executions by lethal injection. They do not reflect the sort of societal consensus against lethal injection that would support a judicial determination that this method of execution is cruel and unusual.

By the same token, twenty-eight of the states for which information is available as well as the United States Bureau of Prisons use Pavulon as one of the drugs in their lethal injection protocol.[64] Likewise, twenty-eight of the states and the federal Bureau of Prisons use potassium

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[62] *Cooper v. Rimmer*, 358 F.3d 655, 659, *amended by* 379 F.3d 1029 (9th Cir. 2004) (adds concurrence of Judge James R. Browning); Denno, 63 Ohio St. L.J. at 142-45.

[63] *See, e.g.*, *Cooper v. Rimmer*, 358 F.3d at 357; *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998); *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ala. 1992); *State v. Webb*, 750 A.2d at 457-58; *Sims v. State*, 754 So.2d 657, 668 n.20 (Fla. 2000); *Moore v. State*, 771 N.E.2d at 56 n.4; *Wheeler v. Commonwealth*, 121 S.W.3d at 186; *Spencer v. Commonwealth*, 385 S.E.2d 850, 853 (Va. 1989).

[64] Denno, 63 Ohio St. L.J. at 146. Twenty-seven states use the same three drugs that are included in Tennessee's protocol. The State of North Carolina uses a two-drug protocol that includes Sodium Pentothal and Pavulon.

chloride.[65] In light of the widespread use of both Pavulon and potassium chloride in lethal injection protocols, and in the absence of evidence showing that elected officials have rejected these drugs, we have no factual basis for concluding that a lethal injection protocol incorporating either Pavulon or potassium chloride, or both, does not comport with contemporary norms and standards of society. It also necessarily follows that Mr. Abdur'Rahman has failed to present sufficient evidence to warrant a conclusion that Tennessee's three-drug protocol offends the dignity of the prisoner or society.

D.

Mr. Abdur'Rahman also asserts that Tennessee's lethal injection protocol creates an unreasonable and medically unacceptable risk of subjecting prisoners to excruciating pain and suffering and a protracted death. He bases this claim on (1) the pain resulting from the injections of Pavulon and potassium chloride, (2) the risk of inadequate sedation, (3) the protocol's lack of detailed procedures, and (4) the risk of error inherent in the protocol. Like the other courts that have addressed these claims, we have determined that Mr. Abdur'Rahman's claims are, at best, speculative and that he has failed to prove that prisoners executed in accordance with Tennessee's three-drug lethal injection protocol will experience unnecessary physical pain or psychological suffering.[66]

The evidence is essentially uncontradicted that the injection of either Pavulon or potassium chloride, by themselves, in the dosages required by Tennessee's three-drug protocol would cause excruciating pain. Without sedation, the injection of potassium chloride would, in the words of the anesthesiologist testifying on Mr. Abdur'Rahman's behalf, "deliver the maximum amount of pain the veins can deliver." Similarly, persons receiving a massive dose of Pavulon without sedation would be conscious while they asphyxiated. Thus, the ultimate determination regarding whether Tennessee's three-drug protocol causes unnecessary physical pain or psychological suffering depends on the efficacy of the injection of Sodium Pentothal that precedes the injections of Pavulon and potassium chloride.

The inquiry here should focus on the objective evidence of the pain a prisoner will experience as a result of the procedure. *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir.), *vacated on other grounds*, 519 U.S. 918, 117 S. Ct. 285 (1996); *Campbell v. Wood*, 18 F.3d at 668; *State v. Webb*, 750 A.2d at 455. All the medical experts who testified in this case agreed that the dose of Sodium Pentothal called for in the protocol is lethal. The state's chief medical examiner stated that persons receiving an injection of five grams of Sodium Pentothal mixed in solution with 50 cc of sterile water would be unconscious in approximately five seconds. He also stated that these persons would not feel pain

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[65]Denno, 63 Ohio St. L.J. at 146. The State of New Jersey uses a two-drug protocol that includes Sodium Pentothal and potassium chloride. While the Appellate Division of the Superior Court of New Jersey recently ordered the Department of Correction to reconsider its protocol, it declined to base its decision on the Department's choice of drugs. *In re Readoption With Amendments of Death Penalty Regulations*, 842 A.2d 207, 212-13 (N.J. Super. Ct. App. Div. 2004).

[66]In his opening statement, Mr. Abdur'Rahman's lawyer conceded that "if everything goes exactly the way it's supposed to go, I don't think the proof is necessarily going to show that it's tortuous."

and would never regain consciousness. Finally, he stated that the anesthetic effects of the Sodium Pentothal would remain until the person receiving the injection died.[67]

Other courts have determined that persons receiving smaller doses of Sodium Pentothal than the dose required by Tennessee's protocol would be sufficiently sedated and would have no perception of consciousness or pain. *In re Williams*, 359 F.3d 811, 813-14 (6th Cir. 2004) (declining to grant a stay of execution using two grams of Sodium Pentothal); *State v. Webb*, 750 A.2d at 451-52; *Sims v. State*, 754 So.2d at 666 n.17, 668 n.19. In light of the evidence that the Sodium Pentothal is administered before the Pavulon and the potassium chloride, and that it remains effective until death occurs, we agree with the trial court's conclusion that Mr. Abdur'Rahman failed to prove that the injection of drugs in accordance with Tennessee's three-drug protocol would cause unnecessary physical pain or psychological suffering.

Mr. Abdur'Rahman's medical expert also criticized Tennessee's protocol because it was "cobbled together by the warden" and because "the design of the protocol is not eloquently thought out." He insisted that the lack of written detailed procedures regarding the handling, preparation, and administration of the drugs created an unacceptable risk that a prisoner would experience a painful death. These arguments overlook the profound difference between the administration of drugs in a clinical setting and the administration of the same drugs to carry out an execution by lethal injection.

Other courts have dismissed similar challenges to the completeness of lethal injection protocols. A lethal injection protocol is not constitutionally infirm simply because it does not specify every step of the procedure in explicit detail. *LaGrand v. Lewis*, 883 F.Supp. at 470; *Sims v. State*, 754 So.2d at 668. Administering the drugs in a clinical setting requires more skill because of the delicate balance between unconsciousness and death. This balance is not required in an execution. *State v. Webb*, 750 A.2d at 456. The State's medical expert observed that starting an IV line and injecting the drugs are not difficult procedures. Therefore, in light of the evidence regarding the intensive training that the persons involved in the execution must undergo, we find no basis in the record to conclude that the absence of more detailed written procedures increases the risk of error to such a constitutionally unacceptable level.

Mr. Abdur'Rahman also insists that the lethal injection protocol must be struck down because of the possibility that the persons involved with carrying out an execution might make a mistake. He argues that other states have experienced problems with several executions by lethal injection using protocols similar to the Department's protocol. Like other courts that have considered this argument, we have determined that evidence of other states encountering problems during executions by lethal injection does not prove that Tennessee's three-drug protocol exposes prisoners to an unacceptable risk of the infliction of needless physical pain or psychological suffering. *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997).

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[67] This pathologist had performed the autopsy on the only Tennessee prisoner executed using the same three-drug protocol at issue in this case. He found that "the levels of pentothal and pentobarbital in Mr. Coe's body at the time of his death were still well within the normal therapeutic range you would expect in someone who is under general anesthesia."

The possibility of human error is implicit in every human endeavor. *State v. Webb*, 750 A.2d at 456. The United States Supreme Court has recognized that unforeseeable accidents do not add a constitutionally impermissible element of cruelty to an execution. *Louisiana ex rel. Frances v. Resweber*, 329 U.S. at 464, 67 S. Ct. at 376-77. Accordingly, the risk of accident need not be eliminated from the process for an execution protocol to survive constitutional review. *Cooper v. Rimmer*, 379 F.3d at 658-59; *Campbell v. Wood*, 18 F.3d at 667; *Reid v. Johnson*, ___ F. Supp. 2d ___, ___, 2004 WL 2022900, at *9 (E.D. Va. Sept. 3, 2004) ; *State v. Webb*, 750 A.2d at 455.

The State of Tennessee has already carried out one execution by lethal injection using the same protocol being challenged in this case. The pathologist who conducted the post-execution autopsy found "no significant difficulties with the process." The warden at the Riverbend facility testified at some length regarding the training of the persons involved in the execution process and described the practice sessions designed to minimize the risk of mistake in the stressful circumstances of an execution. Considering the record as a whole, we find that Mr. Abdur'Rahman has failed to demonstrate that the Department's approach to an execution by lethal injection is so haphazard or lackadaisical that it invites an unacceptably high risk of otherwise avoidable mistakes occurring.

E.

In summary, we have concluded that Mr. Abdur'Rahman has failed to carry his heavy burden of proving that the Department's three-drug lethal injection protocol violates either Tenn. Const. art. I, § 16 or the Eighth Amendment. He has not proved that the protocol is inconsistent with contemporary norms and standards of society, or that it offends the dignity of prisoners or society. He has likewise failed to produce objective evidence establishing that executions conducted in accordance with the protocol will cause prisoners to experience unnecessary physical pain or psychological suffering. Accordingly, we concur with the trial court's conclusion that executions carried out in accordance with the Department's protocol do not constitute cruel and unusual punishment.

VII.
MR. ABDUR'RAHMAN'S ACCESS TO THE COURTS

Mr. Abdur'Rahman takes particular issue with the use of Pavulon on the ground that it will interfere with his access to judicial remedies. Because of the drug's "masking effect," he insists that it will prevent his lawyer from seeking immediate judicial relief because the lawyer will be unable to ascertain whether he is experiencing unnecessary pain and suffering during the execution process. We find no merit to this claim.

All the experts who testified in this case agreed that Pavulon paralyzes a person's skeletal muscles and that it affects a person's ability to move, but not to think or experience pain. The paralysis could prevent a person who has not been adequately sedated from signaling or

communicating that he or she is in extreme discomfort.[68] The expert testimony was graphically reinforced by the testimony of a patient who described going through an entire surgical procedure without being fully sedated and without the ability to communicate the pain she was experiencing. There is no dispute that Pavulon can mask the pain and suffering of persons who are not completely sedated and that these persons would appear to be peaceful despite the pain they were experiencing.

To prevail with this argument, Mr. Abdur'Rahman must prove (1) that it is likely, or at least probable, that he will experience an unconstitutional level of pain and suffering during the execution process and (2) that his lawyer would be able to observe that he is experiencing this degree of pain and suffering were it not for the injection of Pavulon. Mr. Abdur'Rahman's evidence falls short on both counts.

According to the Department's proof, the injection of Sodium Pentothal administered before the injections of Pavulon and potassium chloride will render any person completely unconscious within seconds and will continue to have a sedative effect until death occurs. There is no evidence that persons who receive an injection of five grams of Sodium Pentothal will not be deeply unconscious shortly after the injection begins and will not remain deeply unconscious until death occurs. Therefore, Mr. Abdur'Rahman has failed to prove that there is a reasonable likelihood, or even a possibility, that prisoners executed in Tennessee will experience any appreciable pain and suffering once the injection of Sodium Pentothal begins. In addition, because it is the injection of Sodium Pentothal, not the later injections of Pavulon, that causes the unconsciousness that prevents the prisoner from communicating with his or her lawyer, Mr. Abdur'Rahman has also failed to prove that the Pavulon, as a practical matter, interferes with a lawyer's ability to ascertain whether his or her client is experiencing unnecessary pain and suffering.

VIII.
MR. ABDUR'RAHMAN'S PREFERENCE

Finally, Mr. Abdur'Rahman argues that Tennessee's lethal injection protocol is an "antiquated method of euthanasia" and asserts that the courts should order the Department to devise another procedure more in keeping with the "developing knowledge or techniques in the field of euthanasia." This argument is misdirected. The court's sole responsibility is to measure Tennessee's lethal injection protocol against the requirements of the Constitution of Tennessee and the United States Constitution. *State v. Black*, 815 S.W.2d at 178; *State v. Adkins*, 725 S.W.2d at 664. Once we have determined that the protocol passes constitutional muster, it is not our role to suggest or to require the legislative and executive branches of government to devise a more state-of-the-art procedure.

Mr. Abdur'Rahman's experts insist that executions can be accomplished with equal effectiveness by discontinuing the use of Pavulon and potassium chloride and by replacing Sodium

[68] Mr. Abdur'Rahman's medical expert testified that if someone were in extreme discomfort, "we would expect their whole body to object and rise to the discomfort."

Pentothal with a single lethal dose of sodium pentobarbital.[69] This may very well be true. However, neither Tenn. Const. art. I, § 16 nor the Eighth Amendment requires states to be on the cutting edge of euthanasia. Nor do they require the states to allow condemned prisoners to select the drugs that will be used to carry out their sentence.[70]

The Department's decision to include both Pavulon and potassium chloride in its lethal injection protocol was based on medical advice, not simply on the fact that other states were using the same drugs. The Department's Director of Health Services, a physician employed by the Department, and a consulting anesthesiologist advised the Department that "the drugs and dosages listed are correct for a lethal injection." Because we have already determined that the Department's three-drug protocol does not result in cruel and unusual punishments, Mr. Abdur'Rahman should address his suggestions for improving the Department's lethal injection protocol to the Department and the Tennessee General Assembly.

IX.

We affirm the judgment and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal to the Tennessee Department of Correction.

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WILLIAM C. KOCH, JR., P.J., M.S.

[69] Mr. Abdur'Rahman rests this argument, in part, on his claim that neither Pavulon nor potassium chloride serve a useful purpose in the execution process. The State's medical evidence disproves this assertion. The protocol calls for the injection of independently lethal doses of both Pavulon and potassium chloride. The Pavulon causes breathing to cease, and the potassium chloride stops the heart. According to the state medical examiner, the death of a person receiving the lethal injections required by the Department's protocol is the "combination of the three medications administered as part of the lethal injection protocol." Redundancy is not constitutionally impermissible. Thus, the Department did not violate either Tenn. Const. art. I, § 16 or the Eighth Amendment by combining three independently lethal drugs to assure that an execution is swiftly and reliably accomplished.

[70] At least one federal judge has suggested that the courts should permit condemned prisoners to override a state's lethal injection protocol and to select the drugs that will be used to execute them. *In re Williams*, 359 F.3d at 814 (Suhrheinrich, J., concurring). We do not concur with this approach.